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Supply chains and unfree labour: regulatory failure in the case of Samsung Electronics in Slovakia

Abstract

The protection of labour rights of temporary migrant workers in global supply chains requires further theoretical and policy research. Through the case of Serbian workers in Slovak electronics supply chains, we look at how the transnational recruitment of labour via temporary work agencies (TWAs) for globally organised production generates heightened forms of exploitation and unfree labour relations. We show that such exploitation occurs in a regulatory framework consisting of various instruments ranging from the Palermo Protocol specific to trafficking, to EU law addressing the mobility of workers, and corporate codes of conduct aimed at guaranteeing worker rights within supply chains. Paradoxically, despite an overregulated field, existing instruments fail to offer a straightforward avenue for redress. We suggest that this failure is an outcome of the current legal and corporate regulatory matrix that allows market competition through work practices that violate basic labour standards and produce the conditions that enable and sustain unfree labour relations, while normalising exploitation in supply chains.

Supply chains and unfree labour: regulatory failure in the case of Samsung Electronics in Slovakia

Introduction

This article uses the case study of electronics manufacturing in Slovakia to examine the scope of regulatory failure in relation to exploitative working conditions in global supply chains. Unfree labour relations were exposed in Slovakia's electronics industry when, on 17 October 2017, Slovak police arrested and detained 23 Serbian workers for illegal work at a supplier for Samsung Electronics, a South Korean multinational (MNC). Serbian workers, despite being in possession of formal contracts specifying that they were being 'posted' to Slovakia for temporary engagement, have been the subject of fraud and deception with respect to pay, working time, health insurance and social security contributions. They were moreover locked into contracts whereby they were liable to pay damages to the employer if they left or switched employers during the probation period. Finally, even though they worked at Samsung plant in Slovakia, they were recruited by a Serbian agency, signed a contract with a Hungarian agency, and then were paid by a Slovak agency. The workers did not know for whom they worked.

At first glance, the situation outlined above could be seen as governed by several different sources of regulatory authority such as the Palermo Protocol, international and Council of Europe human rights law, and European Union (EU) law. We might also expect recent initiatives concerning corporate social responsibility (CSR) to be of

assistance. The research question we pose is: Given the current proliferation of regulatory mechanisms at international, regional level as well as company CSR policies, do these offer means of effective redress, legal or otherwise? By placing the category of temporary migrant workers at the core of our analysis, we illustrate considerable limitations in the application of existing protections to the category of workers pivotal to the functioning of global supply chains. In other words, the case of Serbian workers in Slovakia exemplifies a regulatory failure of diverse hard, soft and non-legal systems to prevent the conditions in which unfree labour can thrive.

In order to understand how regulatory failure comes about, we suggest that there is, in particular, a need to examine the restructuring of global production whereby firms contract out parts of the labour process to other companies, creating a long subcontracting chain (Wagner, 2015). We build on scholarship on supply chains that has been investigating the role of unfree labour relations in sustaining the functioning of globally integrated circuits of production through delivery of flexible and high-speed production (Barrientos, 2013; Phillips and Mieres, 2015). We expand on current literature on unfree labour in supply chains by focusing in particular on subcontracting. Subcontracting, as we suggest through our analysis of the role of formal temporary work agencies (TWAs), creates uncertainty about accountability and makes it difficult to locate the source of control within the chain. By putting TWAs' operations at the centre of our analysis, we show that subcontracting is not just about recruitment and leasing of workers but rather about a comprehensive management of migrant labour that encompasses the control over recruitment, labour process as well as workers' private spheres. Our thesis is that dispersion of responsibility within the chains as well as lack of labour rights protections is

permitting the growth of TWAs and enabling new severe modalities of exploitation that fall within the gaps of existing multiple regulatory mechanisms. Given the relevance for temporary migrant workers for the global organisation of production, we argue that regulatory failure is the result of the current legal and corporate regulatory matrix which allows market competition through work practices that violate basic labour standards, while facilitate normalization of exploitation and unfree labour relations in the global supply chains.

Broadening the field: from human trafficking to forced and unfree labour

The fifteenth anniversary of the 2000 United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter the Protocol), provided an opportunity to evaluate its impact on the problems it targets. Unlike many other international legal instruments, the Protocol, as Jacqueline Bhabha put it, has been 'widely ratified, its definition of trafficking has been extensively invoked, its criminalization mandates have been aggressively followed, its victim protection measures have been enthusiastically cited' (2015: 3). One of the Protocol's key achievements has been formulation of a unitary definition of what constitutes trafficking (Wijers, 2015), which was a precondition for the development of an anti-trafficking normative framework for global action (Gallagher, 2015). In addition, the Protocol had a generative impact on domestic anti-trafficking legislation in that, as for example in the case of the United Kingdom, it broadened and modernized outdated domestic understandings of human exploitation (Parkes, 2015).

At the same time, the Protocol has been criticized for several reasons. As the Protocol

was established as a supplement to the UN Convention against Transnational Organized Crime and located within the sphere of international criminal law, states have tended to view trafficking as a security threat (Gómez-Mera, 2017) to be combatted by strengthening border control and immigration policies (Andrijasevic, 2010; Mai, 2016). The overriding emphasis placed on trafficking as a crime against the state (Coghlan and Wylie, 2011) resulted in vague and often weak provisions for victim protection. For a widely ratified law enforcement tool, the Protocol achieved an extremely low conviction rate for traffickers (Gallagher, 2001; Kangaspunta, 2015). Instead, anti-trafficking measures generate and justify raids on irregular migrants and migrant workers (Kempadoo, Sanghera and Pattanaik, 2015). In this way, punitive immigration and border controls have strengthened the industry associated with trafficking and exacerbated migrants' vulnerability.

The Protocol is widely recognized as establishing an artificial and unworkable distinction between trafficking and smuggling (Brhane, 2015). For example, migrants might voluntarily enter into an employment agreement and only subsequently realize that they were deceived and find themselves in a situation of forced labour (Chantavanich et al, 2016). The problem, Wijers (2015) suggests, is that the Protocol prioritises the use of force in the recruitment and transportation 'phase' of trafficking rather that subsequent coercive labour relations in the workplace. This has meant that authorities often do not regard as trafficked those workers who were willing to remain in exploitative workplaces after initial transportation (Coghlan and Wylie, 2011). Moreover, the binary distinction between free and unfree labour reinforced the idea that forced labour is an 'aberration' (Phillips and Mieres, 2015: 245) from the normal functioning of the labour markets.

These shortcomings, scholars concur, are due to the fact that the adoption of the Palermo Protocol as well as implementation of anti-trafficking policies suffer a significant gender bias observable from the overwhelming focus these place on women, children and sex work (Gallagher, 2001; Marks and Olsen, 2015). In fact, the Protocol has often been used as an instrument of social control to criminalize and remove migrant sex workers from their working environment (Grupo Davida, 2015; Jahnsen and Skilbrei, 2015; Kotiswaran, 2015). Consequently, the Protocol has been critiqued for viewing forced labour in isolation from the broader context of immigration and work and for failing to acknowledge labour exploitation affecting a broad constituency of marginal workers (Kotiswaran, 2015). In addition, as forced labour is often lodged within distinct racialised legacies and correlated with labour markets in former colonies and undeveloped economies (Kempadoo, 2015), it is seen as a feature of pre-capitalist economies that are not yet fully developed or integrated into global production circuits (Strauss and McGrath, 2017). It follows that instances of forced labour have typically been studied as separate from the labour markets in the advanced capitalist economies and apart from global networks of production.

Acknowledging these shortcomings has resulted in a conceptual and policy shift towards an approach that sees the violation of labour rights as a structural phenomenon and the product of the buyer-driven global supply chains. In order to unpack how labour becomes unfree and the mechanisms by which coercion and control are imposed and upheld, scholars examine the commercial dynamics driving global production. Sourcing by larger brands is increasingly taking place through chains or networks of suppliers and contractors, usually in geographically dispersed locations. These chains are characterised by a significant imbalance of power between larger brands (i.e. lead-firms) and their suppliers, in that lead firms decide what goods

are produced and where (Azmeh and Nadvi, 2014). Lead firms' outsourcing of higher-cost and higher-risk aspect of production and distribution to the suppliers creates intense commercial pressure on conditions of price and supply along the chain. The low profit margins available to the suppliers, in turn, place downward pressure on wages and working conditions and give rise to various forms of exploitative work (Mayer and Phillips, 2017).

Temporary workers therefore fulfil industries' need for an 'on demand' workforce that can be 'assembled' on short notice when orders are high and when orders are low can be 'let go', on equally short notice. As contractors are unable to find workers in sufficient numbers locally, this demand is met by temporary migrant workers. Hence, as Barrientos (2013: 1066) puts it so succinctly, 'The labour contracting system is […] integral to the flexible commercial functioning of [Global Production Networks] GPNs across borders in a liberalised global economy.' In this context, scholars have coined several new terms, such as 'labour chains' (Barrientos, 2013) and 'human supply chains' (Gordon, 2017) to indicate the transnational process through which labour is recruited, put to work and confined. In addition, they have shifted the attention from the force at the point of entry to the force in the labour process as a whole. Concepts such as unfree labour as a 'multi-dimensional concept' (McGrath, 2013), 'free-unfree continuum' (Sarkar, 2017) and 'continuum of exploitation' (Strauss and McGrath, 2017) all suggest that deception, coercion and vulnerability occur along the chain from recruitment through until the exit stage.

This conceptual shift went hand in hand with a policy shift. This shift is best conveyed as a move away from the Palermo Protocol and towards a combination of public and private law approaches aimed at protecting worker labour rights in

transnational supply chains. For example, in the absence of an effective regime that regulates actions of TWAs in another state or which holds firms accountable for the action of foreign labour intermediaries, Gordon (2017) argues that the solution is to institute full chain liability for all actors. For Coghlan and Wylie (2011) regulation should instead take place at the national level via increase in labour inspection and enforcement of national labour legislation. Given that transnational and national regulation suffers from profound weaknesses, Feasley (2016: 16) suggests setting up of a hybrid regime that consists of 'international human rights accountability principles codified through state-supported legislation with buy-in from the business community'. Finally, those scholars skeptical about the effectiveness of national labour laws, international human rights principles, and corporate codes of conduct suggest a bottom-up approach based on worker participation and voice (Brudney, 2016).

Taken together, Gómez-Mera (2017) suggests that combined public and private law approaches can play an important role in complementing the Palermo Protocol and in contributing to fill legal and implementation gaps in the early international cooperation against trafficking in persons. We are less confident that this objective has yet been realized. Drawing on our empirical case study of Serbian workers in Slovak electronics supply chain we will show that despite the existence of diverse hard, soft and non-legal regulatory systems, workers have nevertheless suffered severe exploitation and unfree labour relations. We observe, following Thomas (2011), a convergence of diverse systems relating to criminal justice, migration and labour, and trade and how these fail to prevent and arguably even legitimate and enable some of the worst forms of exploitation. We illustrate how legal and other regulatory mechanisms interact in incoherent ways limiting worker voice, which are

then exploited by businesses, whether the TWAs supplying the workers or the lead firms that benefit from migrant worker labour. In doing so, we argue that harms to temporary migrant workers are structural in that they are the product both of the transnational dispersion of production as well as the converging legal regimes that leave those segments of the workforce - pivotal for delivery of fast and flexible production- outside the ambit of labour protection laws.

Methodology

The case we outline draws on primary research conducted by one of the authors in Nitra, Slovakia and secondary data compiled from newspaper articles, websites, and NGO reports in Serbian and Slovak languages. The case study we present here is part of a larger research project on electronics supply chain that studies the impact of global organisation of production on management practices and labour rights in CEE. In that studies of electronics industry in CEE are rather dated (cf. Bormann and Plank, 2010), a qualitative case study was best suited to gain in-depth understanding of the globalised production systems and transnational market for labour. Samsung is a South Korean MNC and was chosen in that it is one of the world's largest and most influential electronics lead firms that relies heavily on subcontracting. Samsung's plants in Slovakia are assembly plants and make extensive use of temporary workers recruited abroad.

Primary research took place in Nitra in 2016 and it consisted of interviews with workers (6), TWAs (6), trade unionists (2), local labour office (1) and labour inspectorate (1). Multiple respondents enabled the project to address different topics following on from their area of expertise, as well as to clarify responses to the same

questions from more than one respondent. The bulk of data that underpins the case study comes from interactions with workers housed in a dormitory and from observations gathered at the dormitory regarding migrant workers living conditions and their daily routines. All interviews, apart from those with workers, were conducted in respective workplaces. Interviews with workers were conducted outside the workplace, in bars, parks and dormitories in order to guarantee participants' anonymity.

In terms of data analysis, the primary data was coded by hand to identify the main overarching themes and then used qualitative software (NVivo) to create more detailed labels for each theme. The data was then triangulated with information from secondary sources on recruitment and work and employment practices. Secondary sources consisted of the Facebook page of a TWA under scrutiny here that detailed the terms of contract for temporary work in Slovakia; newspaper articles in Serbian and Slovak outlets discussing the case of Serbian workers in Slovakia; a report written by ASTRA, a Belgrade-based anti-trafficking NGO; and a confidential country report on Samsung in Slovakia written for industriALL European Trade Union. Triangulation allowed a crosscheck of the accuracy of information gathered regarding recruitment and work and employment practices as well as remuneration and labour rights violations.

Workers' experiences of unfree labour relations

Serbian workers are recruited in their country of origin via TWAs. The TWA we focus on here, one of many, is called (we use an acronym) LP. Its headquarters are in Slovakia and it operates through its subsidiaries in Serbia and Hungary. To recruit

workers, LP claimed to have placed 8000 workers with 100 foreign firms. Its Serbian website and Facebook page expressed interest in recruiting two categories of workers for jobs in Slovakia: non-EU nationals (i.e. workers from Serbia, Bosnia and Montenegro), and EU nationals (i.e. Croatian or Hungarian citizens resident in Serbia). Jobs available were in the food, automotive and electronics industry. LP offered quite detailed information regarding recruitment and working conditions. The pay would be €2.20 per hour with an expectation that there would be enough work so that one could earn €500 or more per month, although the responsibility to provide work would lie not with the Serbian but the Slovak agency. Non-EU workers were informed they could only stay for up to 90 days and could return to work in Slovakia again only after 90 days in Serbia. EU workers could stay longer and earn eventually €3 – €5 per hour; after a year, they could be hired directly by the employer. Payment of wages would take place on the 16th day of every month. Shifts would be twelve hours with a thirty-minute unpaid break permitted only if line managers allow for it. Food could be prepared at the dormitory or bought from the factory canteen for approximately €3. If workers were to leave before the end of contractual 90 days, they would lose the Samsung bonus (25 per cent), the LP bonus (10 per cent) and would have to pay a fine of €30.

Transport by coach from Serbia to Slovakia was free. When boarding the bus, workers needed to buy seven days mandatory travel insurance for approximately €11 as requested by Hungarian authorities when entering the country. The work contract, covering injuries at work, would get signed in Slovakia and the terms of the contract were to be discussed with the Slovak branch. If ill, workers were to report to the Slovak branch and were solely responsible for covering their own hospital treatment

costs. If the workers did not perform satisfactorily during their initial 10 days probation period, switched agencies during their contract, or were made redundant, they could be sent back to Serbia and were to arrange and pay for their own transportation. This is why LP recommended that workers should always have €30-50 in cash. In Slovakia, Serbian workers were to be provided with 'free' accommodation and transport to the assembly plant. If workers did not work or were fired, they had to pay for the accommodation themselves and were to leave the dormitory immediately.

Once in Slovakia, many workers realised that they had been the subject of fraud and deception. According to Sani Dermaku, the Serbian ambassador to Bratislava, every month his staff helps Serbs who say they were deceived by TWAs and who have no money, or no passport because their agency confiscated it. This is consistent with the findings of a Belgrade NGO specialising in trafficking, ASTRA. The deception consists in the fact that workers earned less than they were originally promised, not because they were not paid the notified hourly rates, but due to inaccuracy of the information LP provided about quantity of work. While there was work during high season going from November to March, when one can earn reasonable weekly pay through working twelve hours a day six days a week, in the low season one could only work four days and earn €350 - 400 per month maximum.

While workers were indeed not charged for accommodation and transport to the worksite, these costs were *de facto* deducted from their salaries. As the head of an agency explained in an interview, the standard practice is to deduct about €165 from workers' wages, depending on the quality of the dormitory. In addition, some workers reported that often they did not get the promised 25% bonus from Samsung or the

10% bonus from the agency for regular work attendance. Instead, they had to take on overtime work as otherwise they could face dismissal. If workers were absent three times, even in case of illness, they were let go. Holiday entitlements and rest break entitlements were rarely observed. No worker seemed to be paid in accordance with deductions for social security or had health cover. In addition, the contract the workers signed once in Slovakia specified that if they left during the notice period (presumably the 10 days probation but not clarified in the contract), workers would have to pay damages to the employer totalling their entire pay. Salaries were paid in cash once a week at the dormitories and as no worker was provided with a pay slip or bank transfer, it was impossible to challenge any deductions or non-payment. The dormitory in which the workers were accommodated was in the middle of industrial ruins. It was difficult for workers to go into town as to do so one needed to cross the fields or walk on the highway. When they did so, police would fine them, as pedestrians are not allowed onto the highway. In addition to spatial isolation, workers also experienced social isolation as they were not allowed to bring friends to the dormitories.

Workers referred to the work at Samsung as ‘rad na crno’ or ‘black work’ by which they meant that this is illegal work and that they were not registered anywhere as employed. They reported that, at the border, they were instructed by LP staff to say they were visiting relatives and not mention work or the recruiting agency. For workers this meant that their social security contributions back home were not paid as that they were officially deemed as unemployed by the Serbian state while at the same time unprotected in the Slovak host State. Workers were also unclear whom to contact in case of irregularities as they were recruited by the Serbian agency, signed the

contract with the Hungarian agency, and then effectively worked in Slovakia and were paid by the Slovak agency. For some workers the situation got even more complicated when LP in Serbia was shut down and they were told to sign immediately a new contract (no translation was provided) with a Romanian branch, as they would otherwise receive no pay.

The inability to redress work related irregularities was compounded by significant barriers to protecting rights through union membership or labour inspection. Slovakian unions have been concerned by the presence of agency workers which depresses local wages.[1] Rather than seeking to represent agency workers, they have organised protests in response to their increasing numbers.[2] The labour inspectorate views these workers as engaged in illegal work. This has resulted in situations where the labour inspectorate reported cases of illicit work to the police who then arrested Serbian agency workers, placed several workers in the detention centre for illegal immigrants and then deported them (Chudžíková and Bargerová, 2018: 13).

Overall, this is a workforce caught within the supply chain that they have entered voluntarily but that they find difficult to exit as they are tied into a contract with a particular employer, under a menace of penalty and/or non-payment of wages, subject to illicit deductions from pay, vulnerable to deportation, risking homelessness because of tied accommodation, isolated by geography and language, and distant from any

[1] https://www.economist.com/news/europe/21728993-labour-shortage-means-wages-are-better-inside-eu-serbian-guest-workers-head

[2] See protests in Voderada (http://rs.n1info.com/a251475/Svet/Svet/Slovacka-Peticija-protiv-srpskih-radnika.html) and in Sered (https://mynitra.sme.sk/c/20702672/zamestnanci-fm-slovenska-protestovali-proti-uprednostnovaniu-srbskych-brigadnikov.html)

meaningful legal protections. We will see that these are perils enabled by the EU posting of workers regime, against which international human rights law and corporate codes of conduct do not protect them.

What protections for temporary migrant agency workers?

Our suggestion is that regularity failure in case of Serbian workers in Slovakia's electronics supply chains is the outcome of the current legal and corporate regulatory matrix. We examine first what entitlements this group has under international human rights and protection from trafficking; then we turn to the European law and the transnational initiatives relating to corporate codes of conduct to examine the degree to which these offer protection.

International human rights of migrant workers and protections from trafficking

The best scenario is that these workers can claim equal access to justice and equal treatment of terms and conditions in parity with local workers, by virtue of International Labour Organisation (ILO) Conventions Nos 97 and 143 and the UN International Convention on the protection of the Rights of all Migrant Workers and their Families 1990 (ICRMW). However, these instruments make exceptions for treatment of temporary migrant workers (Fudge, 2012-13) and while Serbia has (at least in part) ratified these instruments, the other states connected to our case study (Slovakia, Hungary and Romania) are not contracting parties.

It may still be argued that as all the states concerned are ILO members, they are obliged to adhere to the 'core' labour standards, which are constitutional principles set out in ILO Declarations of 1998 and 2008, including freedom of association and prevention of forced labour. These are notably also entitlements of all workers as 'human rights' by virtue of the UN Covenants of 1966 and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) to which the states concerned are all signatories. Moreover, 'just conditions of work' under Article 7 of the Covenant on Economic, Social and Cultural Rights 1966 should be applicable, albeit subject to 'available resources'.

Potential assistance for those workers recruited under false pretences from Serbia to Slovakia could potentially arise as victims of trafficking. There would seem to have been 'fraud' and 'deception' under Article 3 of the Palermo Protocol, as well as servitude imposed by the contractual conditions which bind these agency workers to the TWA and their ultimate hirer, Samsung. The apparent consent of some workers to exploitative conditions in advance of their travel and/or their acceptance of further terms subsequent to their transport may seem to exclude them from the Protocol's protection (Coghlan and Wylie, 2011), although such a narrow interpretation of the Protocol would be highly problematic in a situation where workers are economically desperate and forced to make strategic choices that are exploited by others (Shamir, 2012). One would hope that an argument can be made along the lines of an 'abuse of power'. Those subject to readily identifiable fraud and deception at the outset as identified by ASTRA, or who were kept deprived of their passports and capacity to leave, may have more convincing claims.

Under Article 7 of the Palermo Protocol, the State need only 'consider' measures to permit victims of trafficking to stay in country, which did not prevent deportations of Serbian workers in the tech industry from Slovakia. Moreover, distinction in treatment on the basis of nationality of a worker is permitted under International Convention on Elimination of All Forms of Racial Discrimination 1965 insofar as States have the ability to determine immigration and work-related access to their sovereign domain. This means that without some particular agreement between Serbia and Slovakia, the Slovakian Government remains within its rights to detain and deport Serbian workers who have entered illegally, even if the illegality was due to control exercised over them by a third party, namely a TWA.

There is considerable litigation on slavery, forced labour and servitude under Article 4 of the ECHR and the significance of the need for protections is reflected in the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (to which all four States are again parties). Much of this concerns domestic workers deceived and imprisoned;[3] and, in *Rantsev*, the case of a nightclub worker in Cyprus where the police colluded with her detention by her employer.[4] Industrial workers temporarily placed by agencies with high tech firms abroad do not however fit with the usual profile. The actions of a large multinational high-tech firm and extensive agency businesses (spanning various states) which supply labour to such companies are not likely to be viewed as suspect in the way as holding a young girl hostage. We have yet to see a case in which large scale corporate abuse is subjected to criticism,

[3] E.g. SILIADIN v. FRANCE. (Application no. 73316/01). JUDGMENT. STRASBOURG. 26 July 2005. FINAL. 26/10/2005.
[4] RANTSEV v. CYPRUS AND RUSSIA. (Application no. 25965/04). JUDGMENT. STRASBOURG. 7 January 2010. FINAL. 10 May 2010.

although *Chowdhury* suggests that this could be possible where the scale of such abuse is at its most extreme (in that case opening gunfire on unarmed agricultural workers).[5] The danger is that lower levels of exploitation can be seen as inherent and hence 'acceptable' within certain economic sectors (Coghlan and Wylie, 2011: 1519), such that the category of 'victims of trafficking' and forced labour come to apply only to a very small group of workers experiencing the most extreme conditions (McGrath, 2017). If trafficking and forced labour are viewed as merely opposite to free labour and therefore as 'atypical exceptions' (Calvao, 2016), they may serve to normalize exploitation.

The use of EU law and the EU posting of work regime

EU workers have free movement rights and are entitled to move to another EU Member State without a visa, work there without a work permit and, to the extent that they are able to support themselves, reside there for an indefinite period of time. This necessitates under Article 45 of the Treaty on the Functioning of the European Union (TFEU) 'the abolition of any discrimination based on nationality between workers … as regards employment, remuneration and other conditions of work and employment'. So it makes sense that, in this study, Croatian and Hungarian nationals hired from Serbia were not restricted as to the duration of their stay in Slovakia, whereas Serbian nationals were hired on the basis that they would return home after 90 days. EU workers are also entitled to the same pay and terms and conditions as local home state (here Slovakian) workers.

[5] CHOWDURY AND OTHERS V GREECE (Application No. 21884/15). JUDGMENT. STRASBOURG. 30 March 2017.

However, if these EU workers are only temporarily 'posted' from one EU Member State to another with the intention that they will briefly perform certain services (for a service provider) in the host State and then return to their home State, then they are viewed in terms of the employer's right to free movement *of services* (under Article 56 TFEU) and other rules apply.[6] In that 'posting' is considered a movement of services rather than workers, posted workers are notionally regarded as not gaining 'access to the labour market' of the Member State to which they move and industrial action aimed at securing them the same rights as local workers has been regarded as in violation of an employer's free movement rights[7] (Hayes and Novitz, 2013; Novitz, 2018). Exceptions which apply to temporary migrant workers under international instruments apply in a more extensive way under EU law.

Cases of posting are covered by the Posting of Workers Directive (PWD), now supplemented by an 'Enforcement Directive' and amended in 2018 under an Amending PWD operational from 2020.[8] The PWD requires the host EU country to guarantee workers a set of core rights in force in the host state. These consist of

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[6] Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (Laval).

[7] See C-113/89 *Rush Portuguesa v Office national d'immigration* [1990] ECR I-1417; [1991] 2 CMLR 818 [1990] ECR 1417, para 15.

[8] Directive 96/71/EC of the European Parliament and of the Council of 16.12.96 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (PWD); see also the supplementary Dir 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Dir 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (Enforcement Dir 2014); and Dir 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Dir 96/71 concerning the posting of workers in the framework of the provision of services (Amending PWD 2018). This amendment must be implemented by member states by 30 July 2020.

minimum rates of pay (under the Amending PWD now ‘remuneration’); maximum work periods and minimum rest periods; minimum paid annual leave; the conditions of hiring out workers through temporary work agencies; health, safety and hygiene at work; and equal treatment between men and women. There is now express protection of a right to strike in Article 1a of the Amending PWD, but this will remain difficult to exercise in practical terms given linguistic and often physical barriers to effective action, and in legal terms for its aims and effects will still have to be balanced against an employer’s free movement rights under the TFEU.

It is difficult to establish whether Serbian workers were paid the minimum national wage in Slovakia which was then €405 per month. In the contract that we had the chance to examine, workers were paid €352 payment per month for 176 hours of work. This is after the agencies subtracted €160 per month for accommodation and €30 for transport to work. So, the notional payment per month could be regarded as €532, but we doubt this was a fair cost and deduction. The dormitory accommodation was of a low quality and the workers had no option to leave the site. Further, the solitude of the dormitories as well as workers’ linguistic isolation meant they had minimal opportunities to pursue rights to Protocol rights, non-discriminatory treatment under EU law or even the minimal guarantees available under the PWD.

It also became evident that workers recruited via LP were not all genuinely temporary. Several interviewed said that they had been working through agencies for Samsung for years. This is a common plight of posted workers now addressed by the Amending PWD of 2018, which from 2020 will require member states to set a 12 (or in some cases 18) month time limit on temporary posting and the minimum standards

(as opposed to equality) approach of the PWD.

In addition, the posting regime only applies to workers who are in 'an employment relationship', whether with the employer from their host State or with the agency in question. It is complicated to establish the identity of the employer, as the Serbian subsidiary was responsible for the recruitment, the Hungarian one for the employment contract and a Slovak agency for the accommodation, food and remuneration in Slovakia. This illustrates the difficulty of determining who the employer is in contemporary supply and global value chains (Prassl, 2015). The PWD also applies only to the temporary movement of workers *between EU Member States*. It is questionable whether import of labour from Serbia should be covered, but arguably travel through Hungary and that a Hungarian, Romanian or Slovakian agency did the hiring may make this possible. If not, then immigration provisions operating between Serbia and Slovakia apply.

The capacity of third country nationals to exercise mobility under the PWD is not explicitly set out there. But it has come to be accepted that the host Member State may not impose administrative formalities or additional conditions on posted workers who are third-country nationals when they are lawfully employed by a service provider established in another Member State.[9] The difficulty in our case is trying to assess whether we could describe the Serbian workers as lawfully engaged in Hungary before their arrival in Slovakia. This seems more doubtful and depends more on the individual discretion of the Member States involved. An interview with the Hungarian Ministry of Labour conducted by the Prague-based MKC revealed that

[9] See Intra-EU Mobility of Third-country Nationals, European Migration Network Study 2013, at 28, citing *inter alia* Case C-43/93 *Vander Elst*, judgment of 9 August 1994; Case C-445/03 *Commission v Luxembourg*, judgment of 21 October 2004.

much depended on the requests made by multinational companies on a pragmatic temporary staff basis:

> 'There is the opportunity to post workers to Hungary from neighbouring countries (not EU member States: Ukraine and Serbia) for a specific time and for a specific location, in some clearly defined professions, without work and residence permit. […] Inspection of these posted workers is complicated in Hungary … and even more complicated of course, when they show up in other countries as re-posted workers.'

Potential re-posting is clearly visible in our case study. Once LP in Serbia got shut down by the authorities, workers whose contracts were with a Hungarian subsidiary of LP, were straightaway put on new contracts with a Romanian company. This operating of labour intermediaries and legal ambiguity as to the origins of the workers makes enforcement of the minimum entitlements under the Posting of Workers Directive near impossible. It appears that corporate entities, both the agencies and the large corporations to whom they supply labour, are exploiting this uncertainty as to the remit of the posting provisions which apply under EU law.

Codes of corporate social responsibility

Samsung has put in place several codes of social responsibility, which creates uncertainty and confusion as to the appropriate source of recourse for workers. Those most relevant for our analysis are the 'Samsung Global Code of Conduct', [10]

[10] http://www.samsung.com/global/ir/governance-csr/global-code-of-conduct/.

'Responsible Management of Supply Chains'[11] and the 'Samsung Migrant Worker Guidelines'. [12]

The Samsung 'Global Code of Conduct' explicitly puts shareholders and maximising profit as company's main objective (Principle 3.2) but does makes provision for employees' 'quality of life', 'equal opportunities' and 'capabilities' (Principle 3.3). International labour standards are only expressly recognised in relation to health and safety of 'employees' (Principle 3.4).

The code relating to 'Responsible Management of Supply Chain' requests that the suppliers abide by international standards and regulations. Labour standards are covered in the new Supplier Registration program operated by Samsung, consisting of 'mandatory on-site audits on 20 articles, including voluntary work, compliance with work hour regulations, and ban on discrimination'. This however is not in line with the ILO core labour standards, which include freedom of association and forced labour. Nor does the internal audit envisaged map onto the rigorous due diligence processes recommended in the UN Guiding Principles on Business and Human Rights (2011).

The 'Migrant Worker Guidelines' (the Guidelines) adopted most recently in December 2016 undertake to respect the local labour laws of the states in which Samsung operates as well as international labour standards. The Guidelines provide a broad definition of a 'migrant worker' (namely 'a person who is engaged or has been

[11] http://www.samsung.com/uk/aboutsamsung/sustainability/supply-chain/.
[12] http://images.samsung.com/is/content/samsung/sec-aboutsamsung-Samsung_Migrant_Worker_Guidelines.

engaged in a remunerated activity in a state in which he or she is not a national and has to move from one country to another for the purpose of employment') and covers hire through 'recruitment agencies'. It would therefore seem to cover our Slovakian case study and seems generous, envisaging that Samsung shall 'provide migrant workers with opportunities, treatment, working and living conditions, wage rates for jobs performed, shift arrangements, holidays, and working hours equivalent to that provided for local workers… except where different terms are specified under applicable local laws and regulations' (para 9.4). This does not seem to have occurred in Slovakia, perhaps because of the ways in which hiring has occurred through TWAs and the lack of coverage by trade unions.[13] On payment of wages, para. 9.7 envisages direct payment by Samsung to workers 'not less than the minimum wage' and into the worker's bank account. Although there is provision to pay by cash if the worker does not have a bank account, and there is to be a written statement outlining all lawful deductions. Once again, this did not occur with regard to Serbian agency workers in our case study who were paid in cash by the TWAs.

Further, there is to be 'no unreasonable restrictions on migrant workers' freedom of movement in the facilities or accommodations' (paras 9.9 and 9.10). Under para. 10 migrant workers are to have full rights to freedom of association, being free to join a trade union in 'accordance with applicable local laws and regulations.' This is of particular significance, given Samsung's historical opposition to trade union representation.[14] However, there is no acknowledgement that the restricted and

[13] See the view of Emil Machyna, chair of OZ KOVO, the Slovak organisation uniting trade unionists from the machinery industry quoted on 6 March 2017 in https://spectator.sme.sk/c/20470797/economy-seeks-new-blood-outside-eu.html.
[14] https://www.equaltimes.org/south-korea-striking-samsung#.Ww17eOmWzIV

isolated conditions under which the migrant workers live (where they cannot host visitors) are unlikely to enable such representation. There is also a commitment to pay for repatriation at the end of a contract, but not in cases of dismissal due to misconduct (para. 11) and a grievance mechanism accompanies the procedure (para. 12). There is no recognition of the types of penalties imposed by TWAs in our case study.

Ultimately, implementation of the Guidelines seems to rest on the same voluntary commitment and self-regulation as for the 'Responsible Management of Supply Chain' Code. These codes of conduct are not legally binding, but merely statements of intent designed perhaps not so much to affect conduct within supply chains but the reputation of the corporate entity; nor is it clear how they bind the TWAs which supply Samsung with its labour. The Guidelines state that they have been adopted as 'a dedicated member of the Electronic Industry Citizenship Coalition (EICC)' and seemed to follow adoption in 2015 of a comparable 'Supply Chain Foreign Migrant Worker Standard' by Hewlett Packard, indicating recent awareness of the reputational difficulties of continuing current arrangements. These codes are indicative not so much of the goodwill of corporations in the tech industry, but rather the relative 'powerlessness' (Blackett, 2001) and unwillingness of States in opposing their business practices and point to the 'outsourced governance' (Mayer and Phillips, 2017) through which States explicitly delegate governance functions and authority to private actors and standards.. While the Samsung codes are suggestive of respect for human rights standards, they are selective in their coverage (omitting for example trade union rights which could secure assistance for the most vulnerable workers). They do not achieve what could be provided through effective State implementation

of the Palermo Protocol and specific international and European labour standards.

Discussion and conclusions

Our analysis of the regulatory framework illustrates that harms to temporary migrant workers are structural and a product of the global market for labour. In addition they are permitted and enabled by current regulatory framework consisting of various instruments ranging from the Palermo Protocol specific to trafficking, to EU law addressing the mobility of workers, and corporate codes of conduct aimed at guaranteeing workers rights within supply chains, all of which fail to offer labour protection or clear means of legal redress to this group of workers.

We welcome scholarly and policy efforts to move away from the Palermo Protocol and towards a labour rights perspective on forced labour. These efforts emerged due to the well-demonstrated weaknesses of the Palermo Protocol. The first one regards its implementation concentrated on individual criminal and victims rather than on structural causes of human trafficking. The second one concerns its accompanying criminal justice centric approach that privileged prosecution rather than protection and prevention. There has therefore been a conceptual shift towards unfree labour relations in supply chains and policy shift towards regulating activities of a variety of cross-border actors, including MNCs, which in theory should cast a broader net than the Palermo Protocol alone so as to guarantee human rights protections and labour standards. It is therefore rather paradoxical that the Palermo Protocol might be the only instrument that may potentially offer some limited protection to the Serbian workers in our case study.

We can also observe that, far from being just located abroad (see Gordon, 2017) or informal and unregistered (see Barrientos, 2013), TWAs operate across national borders as formally registered companies. LP had a registered office in Slovakia and subsidiaries registered in Hungary and Serbia, which then could utilize the legal regimes applicable to EU vis-à-vis non-EU states in calculated ways, playing on the grey areas in the posting of workers and trafficking regimes, as well as the gaps (and overlaps) in corporate codes. Moreover, apart from traditional recruitment of workers, TWAs are diversifying their operations to include transportation and housing of workers as well as direct management of production, whereas previously it could be assumed that such responsibilities lie with the firm (Purcell et al., 2004). In this way, as Andrijasevic and Sacchetto (2017) convincingly demonstrate, TWAs gain profit from comprehensive management of migrant workforces rather than from manipulation of debt accrued from recruitment, transportation and visa fees.

These considerations are relevant not only conceptually but also in regulatory terms. If TWAs are 'enterprises in their own right' (Coe et al., 2010) that provide casual migrant workers for just-in-time transnational production rather than simply informal recruiters, then regulatory interventions need to respond to this novel situation on the ground. There is notably no case law under the ECHR which fully grapples with this situation, although there remains scope to address this issue through national level implementation of the Palermo Protocol.

The category of temporary migrant workers seems to be a problematic one for international and European law and corporate codes alike. Despite standards set by international human rights instruments, states retain their rights to determine

immigration and work-related access to their sovereign domain. The operation of the EU PWD 'disembeds' temporary workers from host country's institutional employment framework and (thus far) from collective channels of representation. Consequently, the posting relationship strengthens competitive subcontracting, favouring firms while constraining the rights of workers (Wagner, 2015). Finally, corporate codes of conduct offer a voluntary commitment to workers' rights, but the primary motivation remains to maximize profits. So, while Samsung's 'Migrant Worker Guidelines' make a commitment to hire migrant workers directly, they also envisage hire via TWAs when 'necessary' and the extent to which they regulate that form of hire is unclear. This necessity is not occasional but has become structural: in January 2017, a Samsung plant in Slovakia had 570 permanent and 1000 temporary agency workers.[15]

Quite counter-intuitively therefore, unfree labour relations do not occur in the absence of labour market regulations but rather in the context of a complex 'overregulated' legal and codified regulatory landscape. The combination of international, regional and corporate regulation has established a 'system of institutional exploitation' (Wagner and Hassel, 2016) of temporary migrant labour so as to utilise wage differentials between countries or 'cost savings authorized by law' (Gordon, 2017: 495). This system of exploitation includes unreliable and inadequate payment for work, extremely high financial penalties for leaving work, postponement of wages, isolated and 'tied' accommodation (and provision of such accommodation at an unreasonably high cost), as well as obstruction of trade union representation and access to worker voice.

[15] https://spectator.sme.sk/c/20748727/samsung-will-shut-down-its-slovak-plant.html

‘Enforcement gaps’ and the ‘fragmentation of norms’ characteristic of the legal frameworks governing supply chains (ILO, 2016) allow market competition by enabling the supply of temporary migrant labour through work practices that produce and maintain unfree labour relations. Our case study demonstrates that ‘normal’ functioning of the supply chains is contingent on unfree labour relations which are established through new (and legal) forms of labour intermediation whose influence has yet to be fully appreciated. We need reform and consolidation urgently, which is only possible with due appreciation of the normalization of such practices and the urgency of the need to address these.

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